21-5084

ORIGINAL

No. 21-

IN THE

SUPREME COURT OF THE UNITED STATES

Donald H. Kimball,

Petitioner,

v.

Altoona, IA. Police Department, Chief Greg Stallman (individual)

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Appendix A

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United States Court of Appeals
For The Eighth Circuit
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111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

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December 09, 2020

Mr. Donald H. Kimball
111-57
4813 Ridge Road
Douglasville, GA 30134

RE: 20-2188 Donald Kimball v. Altoona Police Dept, et al

Dear Mr. Kimball:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

NDW

Enclosure(s)

cc: Mr. Clerk, U.S. District Court, Southern Iowa
Mr. Seth R. Delutri
Mr. Benjamin R. Erickson
Mr. Jason Palmer

District Court/Agency Case Number(s): 4:19-cv-00149-SMR

United States Court of Appeals
For the Eighth Circuit

No. 20-2188

Donald H. Kimball

Plaintiff - Appellant

v.

Altoona Police Dept; Greg Stallman, Chief

Defendants - Appellees

Appeal from United States District Court
for the Southern District of Iowa - Central

Submitted: December 4, 2020
Filed: December 9, 2020
[Unpublished]

Before BENTON, KELLY, and GRASZ, Circuit Judges.

PER CURIAM.

Donald Kimball appeals the district court's[1] dismissal, under Federal Rule of Civil Procedure 12(b), of his pro se 42 U.S.C. § 1983 action. Having carefully

[1]The Honorable Stephanie M. Rose, United States District Judge for the Southern District of Iowa.

reviewed the record and the parties' arguments on appeal, we find no basis for reversal. *See Montin v. Moore*, 846 F.3d 289, 292 (8th Cir. 2017) (de novo review of Rule 12(b)(6) dismissal). The judgment is affirmed. *See* 8th Cir. R. 47B.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DONALD H. KIMBALL, Plaintiff, v. ALTOONA, IOWA, POLICE DEPARTMENT; CHIEF GREG STALLMAN (individual), Defendants.	)	Case No. 4:19-cv-00149-SMR-HCA ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiff, Donald H. Kimball, filed this lawsuit against local law enforcement following an altercation involving guns, money, and one fateful game of "Three Card Monte" that led to his arrest. [ECF No. 1]. Defendants moved to dismiss. For the reasons discussed below, Defendants' Motion to Dismiss, [ECF No. 7], is GRANTED. Plaintiff's Motion for Leave to Amend, [ECF No. 21], is DENIED.[1]

I. BACKGROUND

For the purpose of Defendants' Motion to Dismiss, the Court accepts as true the factual allegations set forth in the Complaint. *See Brown v. Medtronic, Inc.*, 628 F.3d 451, 459 (8th Cir. 2010) (indicating that courts must accept as true the plaintiff's factual allegations, but they need not accept as true the plaintiff's legal conclusions). On June 28, 2018, Plaintiff was parked at the Flying J truck stop in Altoona, Iowa, while driving his motor home from Georgia to North Dakota to start a new job. [ECF No. 1 ¶ 19]. A man approached Plaintiff and informed him of another man

[1] Defendants requested oral argument, but the Court finds a hearing to be unnecessary. *See* LR 7(c). As such, Plaintiff's Motion Opposing Oral Argument, [ECF No. 18], is GRANTED.

who had won some money at the nearby casino and was giving away $200 in gas money to veterans who would shake his hand. *Id.* ¶¶ 19–20. Plaintiff followed the man past several rows of parked trucks to the back of the parking lot where he encountered a group of five men playing "Three Card Monte," a card game used to swindle unsuspecting participants through deception and sleight-of-hand. *See id.* ¶ 21–22. One of the men, identified by Plaintiff as the "dealer," held a considerable amount of money. *Id.* ¶ 23. As Plaintiff reached out to shake the man's hand, the dealer proposed to instead match the amount of cash Plaintiff had with him. *Id.* ¶¶ 24–25. Plaintiff left to retrieve $1,300 from his motor home. *Id.* ¶ 26. He returned to the group with his money—and his pistol. *Id.* ¶¶ 26–27. At the time of the incident in question, Plaintiff, a Georgia resident, had a valid weapons-carry license issued by his home state. *Id.* ¶ 10. Iowa law grants reciprocity to weapons-carry licenses issued by other states and recognizes Plaintiff's right to carry a concealed firearm. *See* Iowa Code § 724.11A.

When Plaintiff handed over his money to be counted by the supposedly beneficent card dealer, the other men in the group started yelling at Plaintiff to "find the Jack"—a reference to the object of Three Card Monte. *Id.* ¶¶ 29–30. Plaintiff states he attempted to grab his money back—disavowing any intention of playing the card game—but he was confronted by the other men in the card group who hit him and pushed him away. *Id.* ¶¶ 32–33. The dealer bolted with Plaintiff's money. *Id.* ¶¶ 31–32. Plaintiff, confronted by the four other men advancing upon him, drew his firearm; they dispersed. *Id.* ¶¶ 32–35.

Plaintiff gave chase. *See id.* ¶¶ 36–38. Plaintiff initially pursued the dealer (who still had Plaintiff's money), but soon lost sight of him and started after the others instead. *Id.* ¶ 37. Plaintiff witnessed the other men pile into a minivan and, as they sped away, fired at least one shot from his

firearm "[i]n the hopes of getting them to stop." *Id.* ¶ 38. Plaintiff then stashed his firearm in his mobile home. *Id.* ¶ 39.

When law enforcement arrived on the scene, the dealer remained at-large. *See id.* ¶¶ 37, 45. Plaintiff informed them of the events that transpired and the location of his loaded pistol, and an officer immediately entered Plaintiff's motor home to secure the firearm. *Id.* ¶¶ 40, 43. Defendants ultimately apprehended the other individuals involved in the encounter shortly thereafter. *Id.* ¶ 47.

Plaintiff and the other men were then transported to the Altoona police station. *Id.* ¶ 49. After interviewing Plaintiff and the members of the card-playing group, Defendants arrested Plaintiff for discharging his firearm within city limits, in violation of Altoona City Code § 41.08 (2018). *See id.* ¶¶ 51–58. The other individuals were allowed to leave. *See id.* ¶ 60. Bail was set at $300, but Plaintiff chose to wait in a cell until he could be seen by a judge. *Id.* ¶¶ 64–65. At his arraignment several hours later, he pleaded guilty to a simple misdemeanor and paid a $100 fine. *Id.* ¶ 67.

Afterwards, Plaintiff contacted the Altoona Police Department to retrieve his driver's license and firearm, both of which had been confiscated by Defendants upon his arrest. *Id.* ¶ 69. Plaintiff was informed Defendants would not return the weapon to him and no longer possessed his driver's license because it had been lost. *Id.* ¶ 70. Plaintiff complains his firearm was returned to him several weeks later only after much communication with Polk County Courthouse and Altoona City Attorney's Office. *See id.* ¶¶ 74–78. As a result, Plaintiff was forced to stay in Iowa until the return of his personal items and missed two weeks of employment he had anticipated in North Dakota. *See id.* ¶ 79.

Plaintiff raises seven claims in his pro se Complaint: breach of legal duty (Count I); defamation (Count II); criminal conspiracy (Count III); unlawful seizure of property (Count IV);

cruel and unusual punishment (Count V); violation of civil and constitutional rights under 42 U.S.C. § 1983 (Count VI); and violation of rights protected under the Second, Fourth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution (Count VII). *Id.* at 23–24. Defendants promptly moved to dismiss. [ECF No. 7].

II. STANDARD OF REVIEW

The Federal Rules of Civil Procedure require a complaint to present "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Though pro se pleadings are held "to less stringent standards than formal pleadings drafted by lawyers," *Haines v. Kerner*, 404 U.S. 519, 520 (1972), a complaint is subject to dismissal when it "fail[s] to state a claim upon which relief can be granted," Fed. R. Civ. P. 12(b)(6). To meet this standard, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (citation omitted). All reasonable inferences are drawn in the plaintiff's favor, *Crooks v. Lynch*, 557 F.3d 846, 848 (8th Cir. 2009), but a plaintiff must plead more than mere "labels and conclusions" or "'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (alteration in original) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)).

III. ANALYSIS

Plaintiff's seven-count Complaint is better understood as asserting six distinct grievances against the Altoona Police Department and Chief Stallman for their handling of the altercation with the men playing Three Card Monte. Each will be considered in turn.[2] None have merit.

[2] Section 1983 imposes liability on "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured

A. Breach of Legal Duty

Count I of Plaintiff's Complaint alleges Defendants breached a legal duty owed to him in the course of their response to the incident at the Flying J. His claim is predicated on two allegations: first, Plaintiff asserts Defendants failed to fulfill their duty to uphold the law and arrest the group of card players when Defendants "release[ed] the perpetrators" and arrested him instead; second, Plaintiff contends Defendants violated their duty to keep him safe when they decided to "parade[] [him] by such perpetrators" as they escorted Plaintiff out of the police station to the jail for booking. *See* [ECF No. 1 at 23]. Defendants contend the former is barred by the public duty doctrine, and the latter by discretionary function immunity. The Court agrees.

The public duty doctrine defeats Plaintiff's first allegation. A duty is actionable only insofar as a relationship between individuals imposes a legal obligation upon one for the benefit of the other. *Sankey v. Richenberger*, 456 N.W.2d 206, 209 (Iowa 1990). "Under the public-duty doctrine, 'if a duty is owed to the public generally, there is no liability to an individual member of that group.'" *Estate of McFarlin v. State*, 881 N.W.2d 51, 58 (Iowa 2016) (quoting *Kolbe v. State*, 625 N.W.2d 721, 729 (Iowa 2001)). In other words, "[t]he public-duty doctrine applies when the state's duty is owed to the general public rather than to a particularized group of persons." *Id.* at 62. Defendants' decision to arrest Plaintiff, rather than the alleged con men, clearly falls within the scope of their duty to the public generally, not Plaintiff individually.

Two exceptions constrain the public duty doctrine to create a legal duty to act on behalf of or protect the health and welfare an individual citizen: "[w]here the police create the situation which places the citizen's life in jeopardy"; and "[w]here the police take a citizen into custody or control."

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by the Constitution and laws." 42 U.S.C. § 1983. Because Plaintiff's constitutional claims are enforced against municipal actors through that statute, the Court's analysis reflects an application of Plaintiff's constitutional claims in Counts VI and VII through that lens.

Hawkeye Bank & Tr. v. Spencer, 487 N.W.2d 94, 96 (Iowa Ct. App. 1992). Neither is applicable under the first allegation made here. The bottom line is that "Iowa does not recognize an independent tort for negligent investigation of crime by law enforcement officers." *Hildenbrand v. Cox*, 369 N.W.2d 411, 415 (Iowa 1985) (citing *Smith v. State*, 324 N.W.2d 299, 300 (Iowa 1982)); *see also Sankey*, 456 N.W.2d at 209–10 (affirming dismissal of negligence claims against police chief for failing to prevent fatal shooting spree).

Plaintiff's second allegation is barred by Defendants' statutory discretionary-function immunity. The Iowa Municipal Tort Claims Act ("IMTCA") immunizes local government officials and employees from "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion is abused." Iowa Code § 670.4(1)(c). Iowa courts, adopting the two-part test of *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988), apply discretionary-function immunity where (1) the contested action was a matter of judgment or choice for the acting employee; and (2) the action required an element of judgment that the exemption was designed to shield. *Cline v. Union Cty.*, 182 F. Supp. 2d 791, 799 (S.D. Iowa 2001) (citing *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 18 (Iowa 2000); *Goodman v. City of Le Claire*, 587 N.W.2d 232, 237–38 (Iowa 1998)). "[A] . . . law enforcement officer's on-the-spot decisions concerning how to effectuate an arrest . . . fall within the discretionary function exception . . . absent a specific mandatory directive to the contrary." *Hart v. United States*, 630 F.3d 1085, 1090 (8th Cir. 2011).[3] This obviously includes the method of Plaintiff's arrest and transport.

[3] Because Iowa has expressly adopted *Berkovitz*'s two-part test for determining discretionary function immunity under the Federal Tort Claims Act, authorities applying that federal statute are persuasive in analyzing Iowa's identical immunity scheme under the IMTCA.

B. Defamation

Plaintiff next alleges, in Count II, that Defendants defamed him by concluding he was "a sore losing gambler." *See* [ECF No. 1 at 23]. "At common law, defamation involved the following elements: (1) publication, (2) of a defamatory statement, (3) which was false and (4) malicious, (5) made of and concerning the plaintiff, (6) which caused injury." *Bierman v. Weier*, 826 N.W.2d 436, 443–44 (Iowa 2013). Plaintiff's defamation claim appears to be premised on two events: the story of the alleged con men that Plaintiff "was a willing participant [of the card game] and he was just a sore loser," repeated to Plaintiff during his interview by the investigating detective; and Defendants' resulting decision to arrest Plaintiff for discharging his firearm within city limits. *See* [ECF No. 1 ¶¶ 54, 58].

Plaintiff fails to advance facts that, assumed to be true, satisfy the first element—that Defendants published any defamatory statement about him. "To prove publication, a party must demonstrate the challenged communication was made 'to one or more third persons.'" *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 47 (Iowa 2018) (citation omitted). Here, by contrast, the Complaint alleges only that the statement complained of was made by the con men and repeated to Plaintiff himself, not anybody else outside the police department. And to the extent the statement is alleged to have been associated with Plaintiff's arrest—by implication, forming the basis for his arrest—it is well within the discretionary function of the municipal police department in conducting its investigations and making arrests. *See* Iowa Code § 670.4(1)(c). The Complaint therefore fails to state an actionable claim for defamation.

C. Conspiracy

In Count III, Plaintiff claims Defendants conspired to further the criminal activities of the card-playing con men by releasing them from custody without charges despite their role in the

altercation and arresting Plaintiff instead. *See* [ECF No. 23–24]. Both Plaintiff and Defendants invoke Iowa Code § 706.1. Never mind that § 706.1 is a criminal statute, and neither party provides authority for the proposition that Plaintiff may *civilly* enforce the state *criminal* code. Conspiracy generally requires an agreement between two or more parties to commit a wrong and for at least one co-conspirator to take affirmative steps towards accomplishing that act; both criminal and civil conspiracy require the parties to have agreed to further some underlying crime or tort. *See* Iowa Code § 706.1(1), (3); *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994) (citing Restatement (Second) of Torts § 876 (Am. Law Inst. 1979)). The Complaint is devoid of any specific, non-conclusory allegation of such agreement.

More fundamentally, though, the Complaint fails to satisfy federal pleading standards by stating a conspiracy claim that is plausible, not merely possible. Plaintiff's accusation amounts to nothing more than a "naked assertion" that Defendants agreed to corruptly enforce the law so as to benefit a group of card-playing con men at Plaintiff's expense. *See Twombly*, 550 U.S. at 557. An "obvious alternative explanation" for Defendants' conduct is that they found the hooligans' version of events to be more credible than Plaintiff's, or simply did not have enough information to establish probable cause for their arrest. *See Iqbal*, 556 U.S. at 682. Given this "obvious alternative explanation," criminal conspiracy is not a plausible inference drawn from the facts alleged by Plaintiff. *Id.* "[W]ithout some further factual enhancement [Plaintiff's accusation] stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Twombly*, 550 U.S. at 557 (second alteration in original) (citation omitted).

D. Seizure of Property

Plaintiff next claims, through his allegations in Counts IV, VI, and VII, that Defendants unlawfully seized his firearm and illegally refused to return it upon Plaintiff's release from jail in

violation of his Second, Fourth, and Fourteenth Amendment rights. He also asserts Defendants failed to follow statutory procedures under Iowa law for the confiscation and prompt return of his seized property. Though Defendants eventually returned Plaintiff's firearm, they apparently lost his driver's license.

1. Initial seizure

Turning first to the initial confiscation of Plaintiff's firearm, it is clear that the seizure of his weapon did not violate any constitutional right. The exigent circumstances exception to the Fourth Amendment's warrant requirement clearly provided an objective reasonable basis for Defendants to conduct a search of Plaintiff's mobile home and seize his firearm after shots had been fired, individuals involved in the altercation were still at-large, and the weapon was not secured. The United States Court of Appeals for the Eighth Circuit has, in many cases, found a warrantless search objectively reasonable in similar circumstances. *See, e.g.*, *United States v. Valencia,* 499 F.3d 813, 816 (8th Cir. 2007); *United States v. Janis,* 387 F.3d 682, 687–88 (8th Cir. 2004); *United States v. Arcobasso*, 882 F.2d 1304, 1306 (8th Cir. 1989). Bluntly, the search of Plaintiff's mobile home and seizure of his loaded firearm was proper under the Fourth Amendment.

Plaintiff argues the officers were not authorized to seize his firearm because he was justified in defending himself under Iowa's new "stand your ground" legislation.[4] *See* Iowa Code § 704.13 ("A person who is justified in using reasonable force against an aggressor in defense of oneself, another person, or property pursuant to section 704.4 is immune from criminal or civil liability for all damages incurred by the aggressor pursuant to the application of reasonable force."). But,

[4] *See* 2017 Iowa Acts ch. 69, §§ 37–44 (codified at Iowa Code §§ 704.1–.3, .7, .13; *id.* § 707.6).

crucially, defense of one's person or property is "justified" only "in the use of *reasonable* force." *Id.* §§ 704.3, .4 (emphasis added). "Reasonable force" is defined as

> that force and no more which a reasonable person, in like circumstances, would judge to be necessary to prevent an injury or loss and can include deadly force if it is reasonable to believe that such force is necessary *to avoid injury or risk to one's life or safety* or the life or safety of another, or it is reasonable to believe that such force is necessary *to resist a like force or threat.*

Id. § 704.1(1) (emphasis added). A very cursory reading of the state's "stand your ground" legislation reveals that Iowa law does not permit the use of deadly force in defense of property. *Id.* § 704.4 ("A person is justified in the use of reasonable force to prevent or terminate criminal interference with the person's possession or other right in property."). And the facts alleged in the Complaint do not support the contention that Plaintiff was justified in using deadly force in defense of himself when, after brandishing his firearm and dispelling any immediate threat of physical violence to himself, Plaintiff chose to give chase to the con men in hot pursuit of his money and discharged his weapon at the fleeing individuals. [ECF No. 1 ¶ 38]. Whatever else may be said about Iowa's "stand your ground" legislation, it does not deputize a private citizen to take law enforcement into his own hands.

Because the seizure of Plaintiff's firearm did not violate the Fourth Amendment, neither does it violate his right to bear arms or due process. "Lawful seizure . . . of firearms . . . does not violate the Second Amendment." *Rodgers v. Knight,* 781 F.3d 932, 941 (8th Cir. 2015).[5] And

[5] In a single sentence, Plaintiff raises a constitutional challenge to the municipal ordinance prohibiting the discharge of firearms within city limits under the Second Amendment. [ECF No. 15 at 26]. That argument is specious, for it is well established that the Second Amendment protects the *possession* of firearms, not their *discharge*. *Cf. Dist. of Columbia v. Heller*, 554 U.S. 570, 592 (2008). Indeed, "the right secured by the Second Amendment is not unlimited." *Id.* at 626. The right to self defense is provided by the Iowa "stand your ground" law, and that, too, is limited. To the extent Plaintiff argues the municipal firearm ordinance conflicts with § 704.13, it does not.

"[w]hen seizing property for criminal investigatory purposes, compliance with the Fourth Amendment satisfies pre-deprivation procedural due process as well." *Walters v. Wolf*, 660 F.3d 307, 314 (8th Cir.2011) (alteration in original) (citing *PPS, Inc. v. Faulkner Cty.*, 630 F.3d 1098, 1107 (8th Cir.2011)).[6] Plaintiff was due no more process prior to the seizure of his firearm.

2. Retention of property

Chapters 808 and 809 of the Iowa Code lay out procedures for law enforcement to follow when seizing, documenting, and returning confiscated property of a criminal suspect. Property seized by arresting officers "shall be safely kept . . . so long as reasonably necessary to enable its production at trials." Iowa Code § 808.9; *see also id.* § 808.8 (requiring seizing officer to maintain an inventory of the property taken). When an individual seeks the return of his confiscated property, the statute permits him to "make application for its return in the office of the clerk of court for the county in which the property was seized," providing a replevin-like remedy. *See* Iowa Code § 809.3(1); *see also id.* § 809.5(1). The claimant is then entitled to a hearing no more than thirty days after filing the application. *Id.* § 809.4.

The Complaint does not indicate that Plaintiff followed these statutory procedures, but in fact admits his firearm was returned when he threatened to do so. *See* [ECF No. 1 ¶¶ 75–78]. That complaint is thus moot. Plaintiff also alleges his driver's license was never returned to him. But without such an application being filed with the state district court, and no mechanism in the statute

[6] Plaintiff also briefly argues he was discriminated against on the basis of his Georgia residency because he was not afforded immunity under the Iowa "stand your ground" law, in violation of the Equal Protection Clause of the Fourteenth Amendment. *See* [ECF No. 15 at 33]. Even viewed liberally, however, his pro se Complaint does not state an equal protection claim. Even if it did, the Complaint does not identify any non-Georgia citizen who was treated differently, or even that Plaintiff was similarly situated under the circumstances.

providing for a civil action for violation of these prescribed procedures, the Court is unable to conclude that Plaintiff has successfully stated a claim under chapter 809 of the Iowa Code.

Even assuming Defendants failed to follow the statutory procedures governing the return of his seized property, this does not, itself, violate Plaintiff's Fourteenth Amendment rights. *See Meis v. Gunter,* 906 F.2d 364, 369 (8th Cir.1990) ("A violation of state law, without more, is not the equivalent of a violation of the Fourteenth Amendment."). Plaintiff essentially claims his due process rights were violated when Defendants did not immediately return his property after Plaintiff's release from jail, delaying the return of his confiscated firearm, and losing his driver's license. *See* [ECF No. 15 at 29]. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge,* 424 U.S. 319, 332 (1976). Procedural due process, therefore, is primarily concerned with "what process is due." *Id.* at 333.

The United States Court of Appeals for the Eighth Circuit "has recognized a due process claim under § 1983 where police officers refuse to return seized items to their owner without a court order *after it is determined that the items were not contraband or required as evidence in a court proceeding.*" *Rodgers*, 781 F.3d at 945 (emphasis added) (citing *Lathon v. City of St. Louis,* 242 F.3d 841, 843–44 (8th Cir. 2001)); *see also Walters*, 660 F.3d at 314–15 (holding deprivation of firearms violated due process when officers refused to return the property "with no legal grounds" to do so). That does not appear to be the case under the facts alleged by Plaintiff. Here, by contrast, the facts alleged in the Complaint state that Plaintiff was under investigation for more serious crimes stemming from the truck stop altercation—attempted murder—at the time he requested the return of his firearm. [ECF No. 1 ¶ 82]. And, he admits, he "verbally vowed to [the

card players] that he was going to get his money back" in front of arresting officers, indicating a possible threat of future violence. *See id.* ¶ 81.

To the extent Plaintiff alleges the continued detention of his firearm constituted a violation of his rights under the Second and Fourteenth Amendments, the facts alleged in the Complaint fail to support such a claim. *Rodgers*, 781 F.3d at 941 (holding no due process violation occurred after three-month retention when law enforcement believed seized firearms were evidence that the plaintiff had unlawfully possessed them and were promptly returned when that theory was dispelled). As for Plaintiff's lost driver's license, "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 328 (1986); *see also Davenport v. Giliberto*, 566 F. App'x 525, 528–29 (7th Cir. 2014).

E. Conditions of Confinement

Plaintiff alleges in Counts V, VI, and VII that Defendants inflicted cruel and unusual punishment on him when Plaintiff was "placed, shackled and thrown into a holding cell at the Polk County jail where it was cold, filthy, and overcrowded." [ECF No. 1-1 ¶ 61]; *see also id.* ¶ 58. Plaintiff complains the shackles "limited [his] mobility and caused serious and painful discomfort," "[t]he benches were steel and ice cold," the jail also housed other detainees who "were drunks, shady, and vicious looking characters" with various emanating bodily odors, and the latrine was filled to capacity. *Id.* ¶ 61. He also complains the jail was dangerous because after the booking process he was left unrestrained, but other detainees were, too. *Id.* ¶ 66. On one hand, Plaintiff appears to be challenging the conditions of his very brief confinement as a pre-trial detainee; on the other, he asserts that his temporary detention was "only done to purposely cause [him] cruel and unusual harm." *Id.* at 24.

Because the Eighth Amendment is concerned only with the punishment of a crime for which a person has been tried and found guilty, the rights of pre-trial detainees are governed by the Due Process Clause of the Fourteenth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979). "The proper inquiry is whether those conditions amount to punishment of the detainee, for, under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt." *Smith v. Copeland*, 87 F.3d 265, 268 (8th Cir. 1996). "Absent a showing of an expressed intent to punish on the part of detention facility officials," a condition of confinement does not amount to impermissible "punishment" if it is "reasonably related to a legitimate governmental objective." *Wolfish*, 441 U.S. at 538–39. Conversely, a condition that is "arbitrary or purposeless" raises an inference that the condition amounts to "punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id.* at 539.

The Complaint does not allege any facts that raise a plausible claim Defendants intentionally sought to punish Plaintiff through his detainment and conditions of his confinement. To the extent Plaintiff contends his arrest and confinement, itself, violated his constitutional rights, that allegation is unfounded. Under the facts alleged by the Complaint, Defendants were justified in arresting and detaining Plaintiff in a jail cell after the conclusion of their investigation, as described above. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985) ("A police officer may arrest a person if he has probable cause to believe that person committed a crime."). And "[o]nce the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention." *Bell*, 441 U.S. at 537. Defendants have legitimate interests stemming from the government's need to manage the safety and security of the facility in which Plaintiff was detained. *Copeland*, 87 F.3d at 268. Their actions taken to temporarily restrain Plaintiff and other detainees are certainly rationally related to this legitimate interest.

As for "[Plaintiff's] desire to be free from discomfort, it suffices to say that this desire simply does not rise to the level of [a] fundamental liberty interest[]." *Wolfish*, 441 U.S. at 534; *see also Copeland*, 87 F.3d 268 ("[T]here is a *de minims* level of imposition with which the Constitution is not concerned."). Plaintiff's account of his booking and (very brief) stay in the city detention facility is unremarkable. Plaintiff states he was placed in a holding cell only until he was processed by the jail. [ECF No. 1 ¶¶ 61–62]. Rather than choosing to pay bail to secure his release, Plaintiff waited several hours longer before pleading guilty and paying a fine at his arraignment before a judge. *Id.* ¶¶ 65, 67. "But the Constitution 'does not mandate comfortable prisons'; it prohibits 'inhumane ones.'" *Williams v. Delo,* 49 F.3d 442, 445 (8th Cir. 1995) (citation omitted). "[O]nly those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of a[] [constitutional] violation." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347, 349 (1981)). In short, none of Plaintiff's complaints about the conditions of his very brief confinement arises to a level that states a violation of his pretrial right to due process. *See, e.g., O'Leary v. Iowa State Men's Reformatory,* 79 F.3d 82, 83 (8th Cir.1996) (per curiam) (holding an inmate "deprived of underwear, blankets and mattress, exercise, and visits" did not establish a constitutional violation); *Copeland*, 87 F.3d at 268 (same, where detainee alleged he was subjected to "raw sewage" from "an overflowed toilet in his isolation cell"); *Seltzer-Bey v. Delo,* 66 F.3d 961, 963–64 (8th Cir. 1995) (same, where inmate was placed "in the strip cell for two days without clothing, bedding, or running water, with a concrete floor, a concrete slab for a bed, and cold air blowing on him"); *Williams,* 49 F.3d at 444–45 (same, where inmate was provided no clothes, running water, hygiene supplies, blanket, or mattress).

Without conducting amounting to "punishment," the conditions of Plaintiff's confinement necessarily cannot violate the Eighth Amendment's "cruel and unusual" prohibition. But even if

the Eight Amendment's "deliberate indifference" standard did apply, Plaintiff's allegations do not show a "serious deprivation of 'the minimal civilized measure of life's necessities' and 'offending conduct [that is] wanton.'" *See Key v. McKinney*, 176 F.3d 1083, 1086 (8th Cir. 1999) (alteration in original) (citation omitted). "Deliberate indifference" requires "more than ordinary lack of due care for the prisoner's interests or safety." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). However analyzed, the Complaint fails to state a claim regarding the conditions of Plaintiff's confinement.

F. Right to Counsel

In Count VII, Plaintiff claims Defendants "did not read him his right [sic] or offer him any counsel," invoking the Sixth Amendment. [ECF No. 1 at 24]. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

But an accused's rights under the Sixth Amendment are not implicated until the initiation of adversarial criminal proceedings by indictment or trial information. *See Beck v. Bowersox*, 362 F.3d 1095, 1101 (8th Cir. 2004) ("The Sixth Amendment right to counsel attaches at a preliminary hearing or arraignment."). Nothing in the Complaint indicates Plaintiff was not afforded appointed counsel at his arraignment, where he pleaded guilty to violating the Altoona city ordinance.

Plaintiff instead appears to be asserting Defendants violated his rights under *Miranda v. Arizona*—requiring law enforcement to inform an accused of his right to remain silent and right to an attorney prior to custodial police interrogation—which are protected under the Fifth and Fourteenth Amendments. 384 U.S. 436, 474 (1966). But no *Miranda* violation actually occurs

until law enforcement attempts to use self-incriminating statements against a criminal defendant at trial. *See Chavez v. Martinez*, 538 U.S. 760, 772 (2003) (plurality op.) (noting "the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of the right protected by the text of the Self–Incrimination Clause"). And in any event, a violation of the *Miranda* safeguards does not give rise to a civil rights claim for money damages; the remedy for such a violation is exclusion of evidence in the criminal case—not a private cause of action. *Hannon v. Sanner*, 441 F.3d 635, 638 (8th Cir. 2006) (holding that the remedy for an alleged *Miranda* violation is the exclusion of any self-incriminating statements from evidence, not an action under § 1983); *see also Chavez*, 538 U.S. at 772 (plurality op.) (concluding that a police officer's "failure to read *Miranda* warnings to [the plaintiff] did not violate [his] constitutional rights and cannot be grounds for a § 1983 action"); *id.* at 790 (Kennedy, J., concurring in part and dissenting in part) (agreeing that "[t]he exclusion of unwarned statements, when not within an exception [to the *Miranda* rule], is a complete and sufficient remedy"). Thus, the Complaint fails to state a claim on this basis as well.

G. Leave to Amend and Supplement

Well after Defendants filed their Motion to Dismiss, Plaintiff moved to amend his Complaint. [ECF No. 21]. A plaintiff is entitled to amend the pleadings once as a matter of course within twenty-one days after the pleadings have been served or twenty-one days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. Fed. R. Civ. P. 15(a)(1). Amendments to pleadings outside this timeframe may be made "only with the opposing party's written consent or the court's leave," which is to be given freely "when justice so requires." Fed. R. Civ. P. 15(a)(2). Likewise, the Court may, in its discretion, "permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the [initial] pleading." Fed. R. Civ. P. 15(d). Defendants filed their 12(b)(6) motion on July 24, 2019, [ECF No. 7]; Plaintiff

moved to amend on March 16, 2020, [ECF No. 21]. Plaintiff is not entitled to amend his Complaint as a matter of right.

In his proposed Amended Complaint, Plaintiff submits additional factual allegations concerning the card-playing con men involved in the altercation leading to his arrest. In short, he alleges he recently encountered those same men at another truck stop in Georgia, and after alerting Defendants of this information, they failed to honor his request that Defendants forward their investigative information to Georgia police. *See* [ECF No. 21-1 ¶¶ 94–101]. The proposed amendment, however, does not add any factual allegations that alter the analysis above and are still insufficient to state a plausible claim upon which relief can be granted. More specifically, the new allegations similarly fail to overcome the public duty doctrine. *See* Part III.A, *supra*, at 5–6. Accordingly, Plaintiff's motion to amend under Rule 15(a) is denied as futile. *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 225 (8th Cir. 1994). And the Court, exercising its discretion for similar reasons, declines to allow Plaintiff's motion to supplement under Rule 15(d). *See United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 673 n.4 (8th Cir. 2003) ("[The plaintiff] cannot supplement his complaint [under Rule 15(d)] as a matter of right.").

IV. CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss, [ECF No. 7], is GRANTED in full. Plaintiff's Motion for Leave to Amend, [ECF No. 21], is DENIED.

IT IS SO ORDERED.

Dated this 14th day of April, 2020.

STEPHANIE M. ROSE, JUDGE
UNITED STATES DISTRICT COURT

Appendix C

United States Court Of Appeals Eighth District

case # 20-2188,

Order- Rehearing En Banc Denial

Filed January 13, 2021.....C23(1)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2188

Donald H. Kimball

Appellant

v.

Altoona Police Dept and Greg Stallman, Chief

Appellees

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:19-cv-00149-SMR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 13, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix D

United States Court Of Appeals Eighth District

case # 20-2188,

Order- Judgment Affirmed

Filed December 09, 2020.....D24(1)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2188

Donald H. Kimball

Plaintiff - Appellant

v.

Altoona Police Dept; Greg Stallman, Chief

Defendants - Appellees

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:19-cv-00149-SMR)

JUDGMENT

Before BENTON, KELLY, and GRASZ, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

December 09, 2020

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix E

United States District Court for the Southern District of Iowa

case # 4:19-cv-00149-SMR-HCA

Judgment - Motion To Dismiss Granted

Filed April 15, 2020.....E25(1)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Donald H. Kimball

Plaintiff

v

Altoona Police Dept
Greg Stallman
Chief

Defendant

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 4:19-cv-149

◯ JURY VERDICT . This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

◉ DECISION BY COURT. This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

that Defendants' Motion to Dismiss, [ECF No. 7], is GRANTED in full. Plaintiff's Motion for Leave to Amend, [ECF No. 21], is DENIED.

Date: April 15, 2020

CLERK, U.S. DISTRICT COURT

/s./ K. Chrismer

By: Deputy Clerk

Appendix F

In the Iowa District Court For Polk County

case # SPCE083243

Order - Granting Authority To Release Weapon

Filed July 06, 2018.....F26(1)-F28(2)

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IN THE MATTER OF PROPERTY SEIZED FROM DONALD KIMBALL	:	CASE NO: SPCE083243
	:	ORDER GRANTING AUTHORITY TO RELEASE SEIZED PROPERTY TO DEFENDANT & CANCEL STATUS CONFERENCE

NOW on this _____ day of July, 2018, the Court, after having reviewed the Motion for Authority to Release Seized Property of Defendant and Waiver of Status Conference, filed by Heather N. Handley-Cherry, Prosecutor for the City of Altoona and the Altoona Police Department, HEREBY FINDS AS FOLLOWS:

1. That the Altoona Police Department has authority to release the seized property currently in its care, custody and control to the Defendant upon entry of this Order.

2. That Status Conference set for July 20th, 2018, at 10:00 a.m. at the Polk County Courthouse, Room 211, is cancelled.

IT IS SO ORDERED.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
SPCE083243	SEIZED PROPERTY OF DONALD KIMBALL

So Ordered

James D. Birkenholz, District Associate Judge,
Fifth Judicial District of Iowa

Appendix G

In the Iowa District Court For Polk County

case # 05771ATSMAC376472 (POLK)

Summary Order - Simple Misdemeanor

Filed, June 29, 2018.....G29(1).

Summary
Title: ALTOONA VS DONALD HARVEY KIMBALL
Case: 05771ATSMAC376472 (POLK)

Originating County	Created
POLK	06/29/2018

Disposition Status	Disposition Date	Reopened Date	Microfilm Ref
GUILTY PLEA/DEFAULT	06/29/2018		

Charges **Speedy Trial:**

Count	Original Charge	Offense Date	Charge Class	Adjudication	Adjudication Charge	Adjudication Class
01	DISCHARGING WEAPONS	06/28/2018	SIMPLE MISDEMEANOR	GUILTY - NEGOTIATED/VOLUN PLEA	DISCHARGING WEAPONS	SIMPLE MISDEMEANOR

Additional material from this filing is available in the Clerk's Office.